The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc. *and* Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7-CA-13059

February 7, 1983

SECOND SUPPLEMENTAL DECISION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On May 6, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board then adopted, *inter alia*, the Administrative Law Judge's finding that the carriers are not employees and that therefore the circulation department district managers directing them are not statutory supervisors but are employees with whom Respondent refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, as amended.

Thereafter, Respondent petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its Order. On October 4, 1979, the court issued its opinion wherein it, *inter alia*, remanded to the Board the issue of the carriers' employee status.[2] The Board accepted the remand and invited the parties to submit statements of position with respect to the issues raised by the remand. The General Counsel, Respondent, and the Union thereupon filed such statements with the Board.

On June 6, 1980, the Board issued a Supplemental Decision and Order in which it found that the carriers are employees within the meaning of the Act and the district managers are supervisors within the meaning of the Act.[3] On June 25, 1980, the Union filed with the Board a motion for rehearing *en banc*, and on July 28, 1980, the Board denied said motion.

Thereafter, the Union filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Respondent and the Board then filed motions seeking discretionary transfer to the United States Court of Appeals for the Sixth Circuit and said motions were granted *per curiam* on November 28, 1980.

On June 29, 1982, the court issued its opinion[4] wherein it found that "there is no question but that the . . . fact-finding" of the Board in its Supplemental Decision as to the employee status of the carriers "does have substantial support." However, in view of the Union's argument "that [Respondent] should be equitably estopped from asserting a position completely inconsistent with its past conduct and representations," the court remanded the case to the Board for "the limited purpose of determination of the equitable estoppel issue." The Board accepted the remand and invited the parties to submit statements of position with respect to the issue raised by the remand. Respondent filed such a statement with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board accepts the court's opinion as the law in the case, and accordingly has reviewed its Supplemental Decision in light of the court's opinion and Respondent's statement of position. For the reasons set forth below, we conclude that equitable estoppel does not lie in this case and that, in any event, the requisites for application of the doctrine of equitable estoppel are not present herein.

The record shows that the Union filed on February 24, 1970, a petition with the Board seeking certification as a representative of the district managers. Thereafter, Respondent and the Union executed a consent election agreement stating that the carriers were nonemployees and that the district managers who directed them were accordingly not supervisors within the meaning of the Act. However, a Regional Director of the Board refused to approve the consent election agreement and submitted the issue of the status of the carriers to the Board. Before that issue was decided by the Board, the Union withdrew its petition and requested the Michigan Employment Relations Commission to conduct an election that was won by the Union which was thereupon certified by the Commission as the bargaining representative of the district managers. Thereafter, said unit was covered by two successive collective-bargaining agreements, the second of which expired in May 1976 when Respondent withdrew its recognition of the Union and refused to bargain with it on the ground that the carriers were employees as defined in the Act and that the district managers who directed them were supervisors within the meaning of the Act. As indicated above, the Board accepted the first remand of the court and agreed with Respondent's position.

We now turn to the issue of equitable estoppel pursuant to the second remand of the court. "It is well established that one who claims under the doctrine of equitable estoppel must show (1) lack of knowledge and the means to obtain knowledge of the true facts; (2) good faith reliance upon the

[1] 229 NLRB 476.
[2] 606 F.2d 689.
[3] 249 NLRB 1081.
[4] 682 F.2d 116, 118.

misleading conduct of the party to be estopped; and (3) detriment or prejudice from such reliance."[5]

However, the Board has in a number of cases held that it is obliged to give paramount consideration to the provisions of the Act regardless of earlier positions taken by any party. Thus, the Board has consistently found that a preelection agreement wherein, as here, an employer stipulates that certain individuals are not supervisors within the meaning of the Act does not estop the employer from subsequently contesting their status because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act.[6]

The Board has also held that it will not recognize the validity of state-conducted elections and certifications where, as here, the composition of the unit is at variance with the policies enunciated by Congress in the Act.[7] The Board further emphasized its obligation to comply with the statutory exclusion of supervisors when it held that even where, as here, certain individuals have for some time been covered by collective-bargaining agreements, it is compelled subsequently to exclude them from the appropriate unit if it can be shown that they meet the test for a Board finding that they are supervisors as defined in the Act.[8]

It is clear from the foregoing Board Decisions that the parties' stipulated unit, the certification of said unit by the State of Michigan, and collective-bargaining agreements for that unit cannot prevail under these circumstances. Accordingly, we find that the principle of equitable estoppel is not applicable in the instant case.

However, assuming *arguendo* that equitable estoppel may be applied herein, we find that this case does not meet the essential criteria thereof.

As indicated above, the Regional Director in 1970 refused to approve the stipulated unit of district managers and hence referred the question of its propriety to the Board. The Union, which was therefore fully aware of that outstanding legal issue, nevertheless withdrew its petition without waiting for its resolution by the Board. The Union and Respondent, which then sought and secured a certification of said unit by a state tribunal, proceeded to bargain for that unit. As a result, the Union and its members benefited from Respondent's willingness, despite the lack of Board approval or certification, to enter into and until May 1976 abide by collective-bargaining agreements which covered the district managers. Insofar as the subsequent loss of continued recognition by Respondent constituted a detriment to the Union, it was not attributable to any misleading conduct on the part of Respondent. Accordingly, we conclude that in circumstances of this case there is no basis for equitable estoppel.

As stated above, the court does not question the Board's finding that the carriers are employees within the meaning of the Act and that the district managers are statutory supervisors. As we have found that equitable estoppel does not lie in this case and that, in any event, the requisites for equitable estoppel have not been met, we hereby affirm the Order set forth in the Supplemental Decision of June 6, 1980.

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[5] *N.L.R.B.* v. *J.D. Industrial Insulation Company, Inc.*, 615 F.2d 1289, 1294 (10th Cir. 1980).

[6] *Esten Dyeing & Finishing Co., Inc.*, 219 NLRB 286 (1975); *Fisher-New Center Co.*, 184 NLRB 809 (1970).

[7] *Mental Health Center of Boulder County, Inc.*, 222 NLRB 901 (1976).

[8] *Washington Post Company*, 254 NLRB 168 (1981).